No. 92-725

IN THE
Supreme Court of the United States

October Term, 1992

SALVADOR GODINEZ, WARDEN

PETITIONER,

v.

RICHARD ALLAN MORAN,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the National Association Of Criminal Defense Lawyers As Amicus Curiae Supporting Respondent

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National Association
of Criminal Defense
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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires trial courts to apply a "reasonable choice" standard to determine a defendant's competence to plead guilty or waive counsel rather than the "competent to assist counsel" standard of **Dusky v. United States**, 362 U.S. 402 (1960).

TABLE OF AUTHORITIES

Cases:

Penson v. Ohio, 448 U.S. 75 (1988)

Wainwright v. Sykes, 433 U.S. 72 (1977)

Henry v. Mississippi, 379 U.S. 443, 451 (1965)

Brookhart v. Janis, 384 U.S. 1, 7-8 (1966)

Drope v. Missouri, 420 U.S. 162 (1975)

Massey v. Moore, 348 U.S. 105 (1954)

Powell v. Alabama, 287 U.S. 45 (1932)

Faretta v. California, 422 U.S. 806 (1975)

Patterson v. Illinois, 487 U.S. 285 (1988)

Faretta v. California, 422 U.S. at 840

Constitutional Provisions:

Sixth Amendment

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 7,000 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's

objectives, and of the entire criminal justice system, is the preservation of defendants' fundamental constitutional right to counsel within the adversary system as provided by the Sixth Amendment. The NACDL is very concerned about any case that would undermine this constitutional right, as would adoption of the position taken by Petitioner in the instant case.

The Amicus Curiae Committee of the NACDL believes that the issues discussed in this case are of such profound importance to criminal defendants, defense lawyers and the administration of criminal justice throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief, and letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Nevada court's inquiry of Respondent Richard Moran was insufficient to establish his competence to waive counsel and plead guilty. At most the court determined only that Mr. Moran was competent to assist counsel at trial. However, a defendant's competence to assist counsel at trial is not the equivalent of his competence to make fundamental decisions pertaining to the waiver of constitutional rights. Contrary to the argument advanced by the Solicitor General, the exercise of a defendant's constitutional right to plead not guilty does not call upon the defendant make any rational decisions pertaining to the conduct of his defense. Indeed, almost every "decision" made during the course of criminal proceedings is made by the attorney with the acquiescence of the defendant. Even the initial plea of not guilty is often nothing more than a ceremony in which a defendant is asked to affirm.

While it is true that defendants do participate in the preparation of their defense and often make critical contributions to their lawyers' understanding of the facts and weaknesses in the State's case, decisions such as what defense to present, which witnesses to challenge, and the composition of the jury, are almost always made by the lawyer alone. Only when a defendant is called upon to waive constitutional rights is the defendant forced to participate. But even in these circumstances a defendant is not asked to make decisions alone.

It cannot be assumed that a defendant who has been adjudged merely competent to stand trial is also competent to waive counsel and plead guilty, especially in a capital case. Even if the standard of competency is the same, the nature of the inquiry is different.

The trial court's inquiry here was woefully insufficient to determine the defendant's ability to make

reasoned choices. As we will show, the defendant's facial awareness of the charges against him, the penalty for these offenses, and the underlying facts supporting the State's case, do not demonstrate anything about the defendant's ability to appreciate or act upon what is in his best interest.

ARGUMENT

The argument which has been advanced by the State of Nevada and by the Solicitor General is constructed upon a premise which is at once misleading and at its foundation utterly false. It is their contention that the "mental abilities needed to make decisions concerning the conduct or one's defense are the same as those needed to make decisions about whether to plead guilty or waive counsel." (Solicitor General's Brief at 10). It follows from this disingenuous premise that if one is adjudged competent to assist counsel at trial, one must be equally competent to waive counsel or to plead guilty (id. at 11).

No lawyer who has ever represented a mentally ill or retarded defendant facing serious criminal charges much less a defendant in a capital case would make, much less believe, such an assertion.

While the law may not distinguish between the "decision" to enter a plea of not guilty and the "decision" to enter a plea of guilty, the reality is that these decisions are fundamentally different, both as to the dynamic involved in their making, and in the identity of the party making the decisions.

When a defendant enters a plea of not guilty at an arraignment or first appearance, he is not called upon to make a choice between going to trial or admitting his guilt. Indeed, where serious misdemeanors or felonies are charged, it is unlikely that a Court would even accept a plea of guilty at this very preliminary stage. This is because when called upon to plead at this early juncture, defendants rarely have full understanding of the charges against them. Even where a defendant has had an opportunity for a meaningful preliminary consultation with counsel, the facts known to client and lawyer are often limited.

In the majority of cases prosecuted in this country, the defendant ordinarily will not have had any lengthy discussion of his case with his lawyer (usually court appointed) before he is called upon to plead. When the initial not guilty plea is entered, it is not as a result of a reasoned or intelligent choice by the accused but in acquiescence to a decision made by a person the accused assumes is qualified to make these judgments - his attorney. Penson v. Ohio, 448 U.S. 75, 109 S.Ct. 346 352 (1988) ("As a general matter, it is through counsel that all other rights of the accused are protected.")

Thus, the initial entry of a plea is a routine announcement, made by the lawyer, which the defendant merely agrees to and, if inquired of by the court, affirms. And once a not guilty plea is entered, a defendant is not required to make any further decisions in his case.[1]

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[1] The Solicitor General argues that "because a decision to stand trial is a decision not to plead guilty,

Contrary to the Solicitor General's suggestion (Solicitor General Brief at 14), defendants are not called upon personally to decide whether to present a defense. Nor are they called upon to determine the nature of the defenses to be raised, the witnesses to present, or the way in which the government's case is to be challenged. These are tactical decisions left to counsel to make. And once made are binding upon the defendant. Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

This is not to say that defendants do not participate in these decisions. In many instances they do, and sometimes their decision is contrary to the advice of

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the level of competence required to decide to stand trial should logically be the same as that required to decide whether to enter a guilty plea," (Solicitor General Brief at 13). As discussed above, this proposition is thoroughly misconceived, proving once again that in law as in most things in life, logic is no substitute for experience.

counsel. But nothing in the actual practice of criminal law requires that defendants make these decisions themselves. Thus a finding that a defendant is aware of the charges against him and is able to assist counsel is not the equivalent of a finding that the defendant would be capable of making important decisions on his own without the guiding hand of counsel.

Fundamentally, finding a defendant competent to stand trial is nothing more than a determination that a defendant has a rational understanding of the proceedings and is capable of assisting counsel. Drope v. Missouri, 420 U.S. 162, 172 (1975). It is not a determination that a defendant is capable of himself making legal or tactical decisions in the absence of the assistance of counsel.

Thus, a defendant may have the ability to assist counsel but no ability to assist himself without the guiding hand and direct assistance of counsel. In virtually

all criminal prosecutions, a defense attorney depends upon his client for an understanding of the facts. Even an innocent person is often a witness or participant in the events which have lead to criminal charges. The information that a lawyer learns about the circumstances of the crime or the defendant's companions, who may be the State's primary witnesses, is often indispensable to effective cross-examination. But in none of these instances is the defendant called upon to himself make a tactical or strategic choice as to the defense to present or the confrontation of witnesses or evidence against him.

Thus, a defendant's awareness of the factual circumstances of the crime or his judicial predicament does not necessarily mean that he has the necessary ability to influence persons or events. For instance, simply because a defendant understands that he is accused of committing a murder does not mean that the

defendant has the ability to determine if it is in his interest to plead guilty. Similarly, a defendant who assists counsel in understanding the facts and helps his lawyer to locate critical witnesses does not necessarily have an adequate appreciation of the significance of the facts to a lawful defense. For instance, knowing which persons could provide an alibi and deciding whether it is in the defendant's interest to put forth an alibi defense require very different levels of understanding and intelligence.

Where a defendant represents himself, however, decisions which are otherwise made by or in conjunction with counsel are made by the defendant alone. This presents dangers which even the most well educated persons possessing the soundness of reason may fail to appreciate. Massey v. Moore, 348 U.S. 105, 108 (1954). As this Court has repeatedly observed:

> Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

Unquestionably a defendant has the constitutional right to represent himself, even to his own detriment. Faretta v. California, 422 U.S. 806 (1975). But this assumes that a defendant is competent to make a knowing, intelligent and voluntary waiver of his right to counsel.

It cannot be assumed that a defendant who has been adjudged merely competent to stand trial is also competent to waive counsel and plead guilty, especially

in a capital case. Even if the standard of competency is the same, the nature of the inquiry is different. The role that the defendant plays in assisting his lawyer is very different from the role that the lawyer plays in assisting his client. To suggest that they are interchangeable is absurd. As we have seen, even where a defendant participates in the making of tactical or strategic decisions, he does so as part of a dynamic which is greatly influenced by the advice of counsel. However, where a defendant represents himself, fundamental choices that he could otherwise defer to his lawyer, he must now make alone.

There is nothing exceptional in Respondent's contention that a more searching inquiry was required by the circumstance presented in this case. This Court has previously held that the nature of the inquiry required before a court can accept a waiver of counsel varies depending upon the stage of the proceedings at which the defendant seeks to waive his right to counsel, with waiver at trial viewed as the most serious. **Patterson v. Illinois**, 487 U.S. 285, 299 (1988).

The State argues that if a defendant is adjudged competent to stand trial but not competent to waive counsel and plead guilty, the defendant could be denied

the benefit of plea bargaining. While we appreciate the State's benevolent interest in the welfare of the accused, that is surely not the situation presented here - where the defendant sought to plead guilty to three capital crimes and to discharge counsel, all without benefit of plea bargaining. Moreover, a defendant's ability to engage in plea bargaining will almost always be enhanced by the presence, not the absence, of counsel.

Thus a finding that a defendant is not competent to waive trial and plead guilty without counsel does not necessarily mean that he will be denied the opportunity to engage in plea bargaining. It simply means that he will have to be assisted in this process with counsel.

In the instant case, the court relied heavily upon the reports of two psychiatrists who were only asked to determine whether the defendant was capable of assisting his lawyers. The psychiatrists, however, were not asked to determine the defendant's ability to make rational decisions either to represent himself or to plead guilty - without plea bargaining - to three capital charges.

The trial court's own inquiry was also woefully insufficient to determine the defendant's ability to make reasoned choices. As we have argued, the defendant's

facial awareness of the charges against him, the penalty for these offenses, and the underlying facts supporting the State's case, do not demonstrate anything about the defendant's ability to appreciate or act upon what is in his best interest.

We recognize that suicide and competency are not irreconcilable and that a person may be perfectly sane and choose to die. Yet the courts must be sensitive to attempts by defendants to use the judicial system to achieve such ends. **Faretta v. California**, 422 U.S. at 840 (Burger, C.J., dissenting)("The system of criminal justice should not be available as an instrument of self-destruction). Plainly, the attempt to end one's life is powerful evidence that the respondent's judgment was seriously impaired. Here the trial court had ample reason to question his competency to waive counsel and plead guilty. Respondent was a long time abuser of alcohol, he had likely committed two of the murders while under the influence of cocaine and he had attempted to take his own life. Having failed to do so, he now sought the assistance of the State in making that attempt - a decision made while he was presently taking four different medications. Surely, the trial court's superficial inquiry was woefully inadequate to establish

that this was a knowing, intentional and voluntary waiver - albeit a suicidal waiver - of respondent's constitutional rights.

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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